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Table of Contents - Issue 3

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CONTENTS

SYMPOSIUM ON UNFINISHED FEMINIST BUSINESS

SYMPOSIUM EDITOR
ANITA BERNSTEIN

FOREWORD: STILL UNFINISHED, EVER
UNFINISHED

Anita Bernstein 641

WHAT IS TO BE DONE?

Kate Millett 659

Since its existence, the feminist movement has fought for equal rights for women, and, in so doing, it has challenged the oldest and most fundamental social scheme in history—patriarchy. Patriarchy is the rule of males over females in all departments of human life, and it is based on custom, belief, law, and ultimately on force. Although the American feminist movement made significant progress in its early years, it has struggled in recent years to accomplish many of its goals. Millett notes that the American feminist movement now stands stalemated, on the defensive, and trying desperately to hold on to the gains it has made. Millett argues that the American feminist movement still can bring about the last days of patriarchy by aligning itself with the international feminist movement. There, feminists have brought about great change by ratifying documents such as the *Convention on the Elimination of All Forms of Discrimination Against Women*. This document, which is still unratified by the United States, is set up with mechanisms that allow nations to bring about sexual equality. Because it challenges patriarchy generally and the American right wing in particular, Millett argues, the *Convention* has been kept forcibly out of public discussion in the United States. Paradoxically, its obscurity testifies to its power.

DRAG = BLACKFACE

Kelly Kleiman 669

Performance in drag is indistinguishable conceptually from performance in blackface, yet the former is embraced while the latter is shunned. This Essay argues that the analogy is powerful enough to justify making drag performance anathema. It outlines the parallel features of the two modes of performance and then rebuts the common defenses of drag performance—that drag subverts gender stereotypes, that it is a matter of private sexual compulsion, that it is a privileged activity of gay men, and that it's just a joke.

POINTS AGAINST POSTMODERNISM

Catharine A. MacKinnon 687

In this Essay, MacKinnon pointedly contends with a central tropism in much postmodernism to “de-realize” reality, contrasting it with feminism’s epistemic and legal accomplishments and potential in remaking the world for women.

REASKING THE WOMAN QUESTION AT DIVORCE

Penelope E. Bryan 713

Bryan first explores the disconnect between the feminist goal of equality for women and women's experience at divorce. Divorce continues to devastate women's economic prospects, frequently deprives them of their children, and sometimes compromises their physical safety. Many feminists have proposed changes to existing law and procedure that offer to protect women's interests in their children, in marital assets, and in their physical safety. Yet theoretical and strategic rifts between feminists continue to compromise their political ability to promote women's interests in divorce. Bryan urges feminists to abandon these differences and return to the basic "woman question" by supporting legal changes that respond to the voices of divorced women. Even if feminists unite around a divorce agenda, however, external factors provide formidable obstacles. If feminists lobby male-dominated state legislatures for reforms favorable to women, they can expect legislators to resist reforms contrary to their own interests. If feminists litigate and/or appeal cases that present the opportunity to create precedent favorable to women, they face judges biased against women.

While Bryan recognizes the danger of such a proposal, she urges feminists to develop a political agenda focused more on the interests of children than on the equality of women. She notes that women, as caretakers of most divorced children, would benefit from such reforms. She justifies this approach by arguing that male legislators might find such an agenda less threatening and, perhaps, more morally and socially compelling than an agenda based on equality between men and women. To confront judicial bias, Bryan recommends that only committed and educated judges should preside over divorce cases. She concludes with a call to all feminists to recognize the importance of divorce issues to women and to mobilize as effectively as they have on other women's issues.

EXTENDING THE PROGRESS OF THE FEMINIST MOVEMENT TO ENCOMPASS THE RIGHTS OF MIGRANT FARMWORKER WOMEN

Richard Kamm 765

Migrant farmworker women are among the poorest of the working poor. Historically marginalized and disenfranchised by feminists and the legal community, as well as by male farmworker activists, migrant farmworker women continue to be plagued by problems of employment discrimination, workplace sexual harassment, and domestic violence. While some feminist legal scholars have argued that the solution to such problems is to make the feminist movement more inclusive and to move away from taking the experiences of white middle-class women as representative of the experiences of all women, Kamm argues that a better alternative would be to provide migrant farmworker women with the resources they need so that they can empower themselves.

FACT'S FANTASIES AND FEMINISM'S FUTURE: AN ANALYSIS OF THE FACT BRIEF'S TREATMENT OF PORNOGRAPHY VICTIMS

Lila Lee 785

In 1985, a group of women called the Feminist Anti-Censorship Taskforce ("FACT") filed a brief that was influential in the Seventh Circuit's decision—subsequently summarily affirmed by the United States Supreme Court—to invalidate Indianapolis' antipornography civil rights ordinance. The brief callously discounted the very existence, and the substance, of extensive victim testimony given by women at the public hearings held in support of the proposed ordinance. Apparently, the writers of the brief existed in a fantasy world, far removed from the lives of women who testified publicly that pornography harmed them.

While victim testimony established that women harmed by pornography wanted a civil remedy to empower themselves against makers and users of pornography who had hurt them, FACT's brief stated that the antipornography ordinance was foisted upon women by right-wing men. While victim testimony established that women suffered physical and dignitary harms when they were used to make pornography or coerced to consume pornography, FACT's brief stated that pornography consists of

images and fantasies, no more harmful than the bogeyman. While victims testified that their lives were devastated by pornography, FACT's brief argued that a civil ordinance that might raise the cost of pornography by damages paid to victims would deprive consumers by raising prices or putting pornographers out of business. While victims testified of their first-hand experience that pornography hurt them, FACT's brief effectively argued that the only credible opinions were those of male experts who studied pornography's effects in laboratories and concluded that there was no harm. While victimized women testified that they were coerced into "consenting" to make, consume, or reenact pornography, with damage to their civil rights resulting, FACT's brief argued that for a woman to contest the "consent" she gave denies her agency.

The same head-in-the-sand denial that enabled the writers of FACT's brief to ignore victim testimony and maintain a fantasy that pornography does not hurt women runs rampant today in both liberal and conservative views on pornography. The fantasy that pornography hurts no one is a part of feminism's past and of feminism's present. It must give way to an honoring of victims' testimony so that feminism can go forward into its future.

BIOLOGY FOR FEMINISTS

Katharine K. Baker 805

Feminists and sociobiologists have more in common than many people realize. In this Essay, Baker argues that feminists can use insights from sociobiology to validate feminist theories about patriarchy and to bolster claims for a greater legal commitment to feminist normative agendas. Paying particular attention to the laws regarding rape, marriage, and parenthood, Baker shows how biology helps confirm what feminists have long argued about the law's inadequate protection of women. Moreover, she shows how biology helps demonstrate the keen need for feminist social norms that help alleviate the harms caused by nature's inequities.

APOSTASY?

Jennifer Gerarda Brown 837

In this Essay, Brown revisits the issue of single-sex education, questioning the wisdom of her own earlier proposal that a women's law school could remedy the alienation, underachievement, and silencing that women are said to experience in law school. The Essay addresses two questions. First, as a growing body of empiricism in some ways supports but in other ways undermines earlier claims that sex is the characteristic most determinative of law school experience, the Essay considers whether a remedy based on sex is viable. Second, and perhaps more importantly, the Essay draws upon Vivian Paley's work with very young children, documented in her book *You Can't Say You Can't Play*, and considers the costs of a women's law school for those outside its walls. Recognizing the pain that sex segregation can cause, the Essay considers whether men who are dissatisfied with law school would feel excluded from a remedy that might have helped them. The Essay then explores the rationales for exclusion, particularly when practiced by historically disempowered people, and concludes that norms of inclusion and antisubordination must be balanced in any reform of women's legal education.

REVIVING THE PUBLIC/PRIVATE

DISTINCTION IN FEMINIST THEORIZING

Tracy E. Higgins 847

In this Essay, Higgins explores the various uses of the public/private distinction in feminist theorizing. She suggests that feminist attacks on the public/private line tend to overstate the threat that the concept poses to women's equality and to understate the potential value of the distinction in feminist theory. Acknowledging that, despite thoroughgoing theoretical critiques, the public/private line persists in practice, Higgins offers a qualified revival of the distinction in feminist theory and suggests ways of refocusing and refining it to respond to existing critiques.

ANALYZING WOMEN'S USE OF THE INTERNET THROUGH THE RIGHTS DEBATE

Reem Bahdi 869

Women's use of the Internet has received very little attention from feminist legal commentators. While they increasingly turn to it as a source of information and as an advocacy tool, feminist legal scholars and advocates have failed to analyze the Internet in terms of its significance to women. In this Essay, Bahdi argues that feminists must be concerned that access to the Internet is often limited to relatively privileged women in relatively privileged countries. Yet, we can harness the Internet in the promotion of women's rights and recognize it as an important feminist medium, as long as we understand its strengths and take its shortcomings into consideration. Indeed, the strengths and shortcomings of the Internet parallel to a large extent those identified by feminists in the rights debate; and the rights debate provides an established framework for assessing the Internet's efficacy—in particular, its role in the feminist agenda of promoting dignity and equality for women. Bahdi thus begins her analysis of the Internet on the familiar terrain laid out by the feminist debate over rights claims. First, she briefly sets out the debate over rights in the context of international human rights law and the evolving norms of violence against women. Next, she turns to the Internet and seeks to draw parallels between the rights debate and the Internet's efficacy in advancing women's rights. Finally, Bahdi discusses the need for vigilance and constant evaluation of our use of the Internet, identifying some strategies that can help make the Internet more accessible to women and women's groups around the world.

FEMINIST LAW AND FILM: IMAGINING JUDGES AND JUSTICE

Orit Kamir 899

This Essay offers a model for systematic application of "feminist law and film" methodology to investigating the imagery of law and justice; to reexamining the relationship between feminist theory that focuses on an ethics of care and feminist theory that focuses on dominance, oppression, and resistance; and to reviewing the relationship between legal feminism and postmodernity. More specifically, employing interdisciplinary methodology, the Essay explores the imagery of a newly developing legal-feminist concept, "caring justice," by focusing on popular cultural images of the judiciary as presented by the film industry. Offering a close reading of a contemporary film, Pedro Almodovar's *High Heels*, the Essay reveals how the film offers a radical and feminist alternative to that of Solomonic justice, which dominates our Judeo-Christian heritage. In *High Heels*, law, embodied in the image of a male judge in drag, is both motherly and fatherly, son and lover, subjective and caring, and above all thoroughly humane and differently just. This Essay argues that the film's imagery of judge and law suggestively expands our contemporary pantheon of images of the judiciary.

CONSTRUCTING FAMILIES IN A DEMOCRACY: COURTS, LEGISLATURES AND SECOND-PARENT ADOPTION

Jane S. Schacter 933

In this Essay, Schacter examines recent judicial decisions on so-called "second-parent adoption," in which one partner in a gay or lesbian relationship seeks to adopt the other partner's child without terminating that partner's legal relationship with the child. With the recent boom of lesbian families in particular, the availability of such adoptions has been litigated in several states. Although the results have been uneven, this has been an area of significant progress for same-sex families, with courts in at least twenty-one states having authorized such adoptions. The appellate rulings in this area have been decisions involving statutory interpretation and have turned on how courts construe existing adoption laws, which are characteristically ambiguous on this point. Favorable decisions have fallen victim to claims of "judicial activism," premised on the notion that considerations of democratic theory require legislatures—not courts—to decide whether second-parent adoptions will be available. Schacter examines this democratic objection and finds it lacking. She argues that even on a conventional, majoritarian account of democracy, the appellate decisions authorizing adoption are on solid ground. She then argues that this conventional account of de-

mocracy is impoverished in ways that are nicely illustrated by these cases and concludes that the cases, in fact, exemplify and are consistent with a thicker set of democratic values that emphasize social pluralism and a strong commitment to social equality.

**THE "NORMAL" SUCCESSSES AND FAILURES
OF FEMINISM AND THE CRIMINAL LAW**

Victoria Nourse 951

Feminist reforms have brought both success and failure to the criminal law in the past several decades. Nourse examines this simultaneous success and failure in three different areas: rape reform, marital rape immunities, and self-defense law. Her analysis urges that the criminal law has not been able to shake itself free of social norms governing intimate relationships—social norms that tend to perpetuate the very sexism feminists aimed to extinguish. Relational norms are upwardly mobile and easily nurtured by the "deliberate ambiguities" necessary to forge legislative and judicial change. Nourse argues that, in this sense, the failures of feminist reform should not be cause for dismay, but are a "normal" incident of a process that demands continued effort and attention.

STUDENT NOTE

**PRETRIAL MEDIATION OF COMPLEX SCIENTIFIC
CASES: A PROPOSAL TO REDUCE JURY
AND JUDICIAL CONFUSION**

Susan E. Cowell 981

This Note proposes pretrial mediation using scientist-mediators for complex scientific disputes. Complex scientific disputes reflect the inherent tension between law and science. This tension results in dissatisfaction among judges, juries, and scientists because of the uncertainties embraced by science, but eschewed by law. Pretrial mediation would address some of these uncertainties before they are introduced into the courtroom. In short, the proposed pretrial mediation should reduce jury confusion and provide judges with guidance to assess the admissibility of scientific evidence and expert opinions by eliminating and clarifying scientific issues.

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SYMPOSIUM ON
LEGAL DISPUTES OVER
BODY TISSUE

Dorothy Nelkin and Lori B. Andrews
Symposium Editors

